Supreme Court, U.S.
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No. 92-1019

IN THE

Supreme Court of the United States

October Term, 1992

SIERRA TELCOM SERVICES, INC.,

Petitioner,

against

THOMAS F. HARTNETT, in his capacity as Commissioner of Labor, and STATE OF NEW YORK DEPARTMENT OF LABOR,

Respondents,

On Petition for a Writ of Certiorari to the New York State Court of Appeals

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 11, 1993

QUESTIONS PRESENTED

1. Whether the New York State Department of Labor's determination that petitioner Sierra Telcom Services Inc. ("Sierra") was required to pay wages on a public work project at the rate actually paid under a collective bargaining agreement in the private sector in the locality of the project conflicts with *General Electric Co. v. New York State Department of Labor*, 936 F. 2d 1448 (2d Cir. 1991), in which the United States Court of Appeals for the Second Circuit held that the adoption of a wage rate, as the prevailing wage rate on public work, from a collective bargaining agreement containing a two-tier wage which required that only the higher of the two wages be used in public work, whether or not that wage was paid on such work in the private sector, would be delegation of legislative power to private parties in violation of the Fourteenth Amendment to the United States Constitution?

2. Whether Sierra, the subcontractor on a public work project, has standing to raise the constitutionality of the State of New York's withholding of money due to the prime contractor on the project, Ericsson Business Communications, Inc. ("Ericsson"), where there is nothing in the record demonstrating any injury to Sierra as a result of that withholding?

3. Whether Sierra has a constitutionally protected property interest in money withheld by the State of New York from amount owed to the prime contractor, Ericsson.

4. Whether the procedural due process challenge of Sierra to the State of New York's withholding of money from Ericsson without prior hearing is moot because of the release of the withheld money, pursuant to a Commissioner of Labor's Order issued after a hearing.

5. Whether admission into evidence at the administrative hearing of three workers' statements regarding Sierra's underpayments of prevailing wages was in violation of rights guaranteed by the Fourteenth Amendment to the United States Constitution?

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas F. Hartnett, Commissioner of the New York State Department of Labor [1]("Commissioner") and the New York State Department of Labor ("Department") hereby oppose the petition for a writ of certiorari filed by Sierra.

[1] Thomas F. Hartnett resigned as Commissioner of the New York State Department of Labor and was succeeded by John F. Hudacs on January 22, 1992.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the statutory provision reproduced in Sierra's appendix, Appendix F, pp. 72-98, further applicable statutory provisions contained in N.Y. Labor Law § 223 are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

1. Statutory Framework

New York Labor Law §220 requires that workers on public work projects be paid not less than the rate of wages prevailing in the locality where the project is located. Labor Law §220 (3). The prevailing wage rates for each trade are based on wages contained in collective bargaining agreements between employers and unions in the project area so long as the agreements cover at least 30% of the workers in that trade. Labor Law §220(5)(a). The Department determines annually the prevailing rate of wages for every trade and occupation performing public work in every locality in New York State. Labor §220(5)(a).

For each public work project, the Commissioner issues a wage rate schedule which lists, for each trade ("job classification"), the prevailing wage rates to be paid to workers on the project. Labor Law §220, (3-a)(a) and (5)(e). The wage schedule is included in the bid documents and becomes part of the contract. Labor Law §220(3). Contractors are obliged by law to pay not less than the wages specified in the schedule. Labor Law §220(3).

If it appears that unpaid wages may be due to workers on a project, the Department is required to notify the financial officer of the public entity which let the public work contract. The financial officer, in turn, is required to withhold, from the prime

contractor,[2] sufficient monies to satisfy estimated wage underpayments plus interest and possible penalties pending a hearing and final determination. Labor Law §220-b(2).

Final determinations are made after an administrative hearing where all parties may subpoena, examine, and cross-examine witnesses. The Commissioner determines whether there are underpayments and, if so, the amount thereof based upon the evidence admitted at the hearing. Interest on underpayments is required and a civil penalty of up to 25% may also be assessed by the Commissioner in the Order and Determination. Labor Law §220-b(2-a). The Commissioner's Order and Determination is subject to review in the New York appellate courts. Labor Law §220 b-(2).

2. Facts

On May 19, 1988 Ericsson entered into a contract with the State University of New York ("SUNY") to furnish, install and maintain a telecommunications system at the New Paltz, N.Y., campus (A 527).[3] In June, 1988, Ericsson subcontracted the installation of the telephone system to Sierra (A 751). The contract specifications included a prevailing wage schedule which described the project as "install voice/data telecommunications system" (A 703) and included prevailing

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[2] New York Labor Law § 223 makes a prime contractor financially liable for all prevailing wage underpayments of its subcontractors. Moreover, money can only be withheld from a prime contractor since the State does not enter into contracts with subcontractors.

[3] References to the Joint Appendix filed in the New York State Supreme Court, Appellate Division are cited as (A _____). References to the Full Record are cited as (R _____).

wage rates for various job classifications listed under the general category of "telephone" (A 705).[4]

On August 1, 1988, Public Work Wage Investigator Kevin Jones ("Jones") visited the job site and spoke to Sierra's project manager and to eight workers (A 294). The project manager informed Jones that all but a few workers were paid the lowest rate under the "linemen" job classification (A 305). The workers all informed Jones that their work involved some aspect of the installation of the telephone system, either pulling wires or putting in conduits (A 295).

Because Sierra claimed the "linemen" job classification applied, Jones spoke to a representative of the union which represented linemen in the locality of the project (A 370). He learned that the linemen had a collective bargaining agreement which included a "telephone" wage rate, but that no work had been done under that agreement in Ulster County, the locality of the project. Therefore, that agreement had not been used by the Department to set the wage rate for telephone job classification or any other job classification in the schedule (A 322, 384). Jones also learned that the linemen job classification and wage rate which was in the prevailing wage schedule applied only to high tension wire work and traffic lights, not telephone installation (A 322). After investigating the

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[4] Two prevailing wage schedules were in effect during the project. The schedule in effect the first four weeks of the project provided that the wage to be paid under the telephone classification was $16.97. This was the wage rate contained in the Electrician collective bargaining agreement of International Brotherhood of Electrical Workers ("IBEW") Local 806 (A 531). That local was taken over by IBEW Local 631 which did telephone installation work under a Telephone Interconnect Agreement. The wage rates in that agreement ranged from $16.25 for telephone installation to $19.25 for PBX installation (A 538). The schedule in effect for most of the project contained those wage rates for the telephone job classification (A 381).

classifications, Jones returned to the site and informed Sierra that the "telephone" job classification in the schedule and not the linemen classification, was the correct one to be used on the project (A 305, 309).

Jones met with Sierra's project manager on November 7, 1988, at which point he determined that Sierra was still paying the wage rate for linemen. He obtained payroll records to conduct an audit and informed Sierra that the Department would issue to SUNY a notice to withhold contract funds from the prime contractor, Ericsson (A 307). On November 17, 1988, Jones spoke to Ericsson's job superintendent, Eric Strassen, to discuss the wage rate which Sierra should be paying (A 311). Strassen pointed out that the new wage schedule had a lower rate for telephone installation, and they agreed that Sierra would be required to pay that lower rate for the rest of the project (A 312). On November 23, 1988, the Department informed SUNY to withhold $505,331 from payments otherwise due to Ericsson.[5] The withholding was sufficient to cover an estimated $348,504.21 in underpayments, plus interest and a 25% civil penalty (A 1152).

In January and February 1989, Jones met with 3 workers on the project. He obtained signed statements from each worker which described the work each performed on the project (A 838-855). He also spoke to Ericsson's project manager and Sierra's project manager, who confirmed the workers' statements (A 512-14).

Work on the project was completed in February, 1989 (R 1049). The Department continued to audit Sierra. On December 18, 1989 the Department issued a final notice of

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[5] Although Sierra claims that Ericsson then withheld money which Ericsson owed to it, no such fact is contained in the record. .

labor law investigation which showed that Sierra had underpaid 81 employees in the amount of $387,751.41 (A. 1148).

3. Administrative Proceeding

On October 4, 1990, an administrative hearing was held to determine whether Sierra had failed to pay prevailing wages and/or supplements to all 81 workers on the project. Ericsson and Sierra asked the hearing officer to issue a subpoena to the Department for a broad array of Departmental records (A 269). After hearing argument, the hearing officer declined to do so on the grounds that all relevant material, including all of the Department's internal files concerning the investigation, had been already produced by the Department (A 363).[6]

Jones was the only witness at the hearing. He testified that he determined the classification of the workers on the project according to the prevailing practices in the area as determined by the collective bargaining agreements which were used to set the prevailing wage rates (A 368, 428). Jones testified that he classified all the workers on the project as telephone workers since the project involved only the installation of a telephone system (A 387).[7] He also testified that the linemen job classification covered only high tension wire work and traffic signals, not telephone installation. The Department had used the Local 613 Telephone Interconnect Collective Bargaining

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[6] During cross-examination of Jones, he mentioned the existence of a Departmental Procedure Manual which was not included in Ericsson's and Sierra's request for a subpoena. It was then produced by the Department upon Ericsson's and Sierra's request (A 442).

[7] Jones classified seventy-two workers as telephone installers, the telephone job classification with the lowest rate on the schedule (A 387). Nine other workers were classified as PBX installers or telephone technician, telephone job classifications with higher wage rates, based upon information received from the workers and/or from Sierra (A 438-9).

Agreement to promulgate the four wage rates for the telephone job classification in the wage schedule. Jones testified that this agreement covered all aspects of installing a telephone system, from unloading trucks when the workers arrive to clean-up at the end (A 372). He arrived at the specific telephone classification for each worker based upon Sierra's payroll records,[8] information he received from the workers he interviewed, and conversations with Local 631, Ericsson, and Sierra (A 345).

Statements of three workers on the project concerning the work that each had performed were introduced into evidence over the objections of Sierra and Ericsson (A 287). Sierra and Ericsson engaged in extensive cross-examination of Jones.[9] At the end of the Department's case, both Sierra and Ericsson moved to dismiss the case, which motions were denied. Neither Sierra nor Ericsson subpoenaed or called any witnesses, nor did they claim that they were unable to do so. Both Sierra and Ericsson declined to offer any testimony, although they did introduce some exhibits into evidence (A 1156-1182).

On March 29, 1991, the Commissioner issued an Order and Determination which adopted the report and recommendations of the hearing officer (A 226). The hearing officer found that Sierra violated § 220 by underpaying all 81 workers on the project. The hearing officer found that Jones properly determined that the workers should be classified as telephone installers and telephone technicians based upon interviews with 11 employees, conversations with Sierra's and Ericsson's

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[8] Sierra's payroll records classified all the workers as either linemen or telephone installers (R. 1049-1422).

[9] On cross-examination, Jones was repeatedly asked if he had written materials provided to him by Sierra (A 410, 479). He indicated that he had been provided some written material at a meeting with Sierra manager, but it was not relevant to job classification and he did not retain it (A 410, 479).

project managers, union business agents, and his supervisor, his review of the payroll records, the project documents, SUNY's request for a schedule and the schedule itself (A 170, 176-177). Ericsson and Sierra had failed to provide any evidence to refute Jones' determination (A 175). The hearing officer found Sierra's violations wilful and recommended a 10% civil penalty. Finally, pursuant to Labor Law § 223, Ericsson, as the prime contractor, was held financially responsible for Sierra's violations (A 179). Sierra and Ericsson appealed to the New York State Supreme Court, Appellate Division, Third Department. That Court of Appeals affirmed the Commissioner's decision in its entirety. *Sierra Telcom Services, Inc. v. Hartnett et al.*, 174 A.D.2d 279 (3d Dept. 1992) *app. den* 80 N.Y.2d 757 (1992), *leave app. den.* 80 N.Y.2d 757 (1992).

SOME CONSTITUTIONAL QUESTIONS WERE NOT PRESERVED BELOW

Although Sierra objected to the hearing officer's refusal to issue a subpoena at the administrative hearing, it never preserved the issue in its appeal to the Appellate Division, or in its attempts to have the Court of Appeals hear the case, either by appeal as of right, or by motion for leave to appeal.[10]

SUMMARY OF ARGUMENT

The Court should deny the petition for a writ of certiorari. There is no conflict between the decision of the New York State Supreme Court, Appellate Division and the opinion of the

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[10] That issue was preserved by Ericsson in a related appeal. The Appellate Division consolidated the appeals for purposes of oral argument and issued one opinion which addressed issues raised in each appeal. Ericsson preserved the subpoena issue in its attempts to have the New York Court of Appeals hear the case.

United States Court of Appeals for the Second Circuit in *General Electric Co. v. New York State Department of Labor*, 936 F.2d 1448 (2d Cir. 1991) ("*General Electric*").

As the court below held, *General Electric* is "clearly distinguishable" on the facts. *Sierra Telcom Services Inc. v. Hartnett et al.*, 174 A.D. 2d 279, at 285. In *General Electric*, the Second Circuit held that it would be an unconstitutional delegation of legislative power to private parties for the State to adopt a prevailing wage rate for public work from a collective bargaining agreement containing a two-tier wage which required the use of the higher of two wage rates on public work projects, whether or not that rate was actually paid in the private sector 936 F.2d at 1455. In this case there is no evidence, or even allegation, that the prevailing wage rate for telephone installation was not actually paid under the collective bargaining agreement in the private sector.

In addition, Sierra lacks standing to challenge the State of New York's withholding of money otherwise due to Ericsson because there is nothing in the record demonstrating that this act caused Sierra any injury. Even if Sierra could demonstrate some injury, it has not demonstrated a constitutionally protected property interest in Ericsson's money necessary to succeed on a procedural due process challenge. In any event, the challenge is moot since the money is no longer being held. The money was released to the workers when the Commissioner found, after a hearing, that they had been underpaid wages. The only relief sought in this action is a review of the Commissioner's Order on the merits of the parties' claims.

Finally, there is no special or important reason for this Court to issue a writ of certiorari to review the constitutionality of the admission of three workers' statements where Sierra itself neither attempted to call the workers nor demonstrated any inability to do so.

REASONS FOR DENYING THE WRIT

1. THIS DECISION OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, IS NOT IN CONFLICT WITH THE UNITED STATES COURT OF APPEALS DECISION IN *GENERAL ELECTRIC CO. vs. NEW YORK STATE DEPARTMENT OF LABOR*

The Appellate Division properly rejected Sierra's unconstitutional delegation claim finding this case distinguishable from the *General Electric* case. *Sierra Telcom Services Inc. v. Hartnett et al.*, 174 A.D.2d at 285. In *General Electric*, the Second Circuit held that New York's prevailing wage law was not an unconstitutional delegation of legislative power to private parties so long as the Department exercised its statutory discretion to reject wage rates contained in collective bargaining agreements which were not actually paid in the private sector. 936 F.2d at 1456. In that case, General Electric alleged that the wage rate it was being required to pay was not actually paid in the private sector[11] but that the wage rate contained in the wage schedule designated was the "public work" rate contained in a collusively negotiated collective bargaining agreement which contained two wage rates for the same work, a private sector wage rate and a higher public work wage rate. General Electric further alleged that the lower private sector wage rate was excluded from public work by the language of the collective bargaining agreement and, because of that language, the Department had *pro forma* promulgated only the higher wage rate as the prevailing wage rate. 936 F.2d at 1457. The Second Circuit held that if General Electric could

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[11] The Department contested these allegations, but the Second Circuit held that it must take them as true for purposes of the appeal. 936 F.2d at 1458-59.

prove these factual allegations, it would establish an unconstitutional delegation of legislative power to private parties in violation of the Fourteenth Amendment to the United States Constitution. 936 F.2d at 1457-8.

In this case, there are no such allegations and no such evidence. In fact, it is clear that the Department rejected a wage rate, contained in the linemen's collective bargaining agreement covering telephone installation, because no work had been done under that agreement in the locality of the project. Thus, that wage rate was not actually paid in the private sector in the locality. Instead, the Department used the wage rates in the Local 631 IBEW Telephone Interconnect Agreement because those wages were actually paid for telephone installation in the private sector in the locality of the project.[12]

Sierra's claim that the Department's actions are in conflict with the *General Electric* decision because it classified workers on the project according to the practices under the collective bargaining agreement misreads *General Electric* (Petition P. 15). In *General Electric*, the Second Circuit held that the use of collective bargaining agreements in setting prevailing wages was *not* constitutionally infirm so long as the wages rates used were actually paid under those agreements in the private sector. 936 F.2d at 1456.

Moreover, Sierra's claim that the Department's actions were unconstitutional because the telephone classification was applied to all workers, regardless of job duties or skill level, to entitle

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[12] Sierra's claim that the Department used Local 631's Collective Bargaining Agreement to determine the scope of the wage rates covered by the agreement because Local 631 claims "it controls all jobs on a public telephone interconnect project in its area" (Petition p. 15) is sheer fabrication. Local 631 made no claims to controlling anything. Instead, the Department used the agreement to determine the scope of the work the wage rates in that agreement covered.

everyone to the pay of a technician ignores the facts (Petition p. 15). With the exception of the nine workers it classified as telephone workers, Sierra itself classified each worker on the project as a technician. The only issue in the case was whether the proper wage rate for the technicians was the linemen rate or the telephone rate. The linemen wage rates were not paid in the private sector in the locality for telephone work. Thus, the Department's determination that Sierra was required to pay telephone wage rates was not in conflict with *General Electric*.

2. SIERRA HAS NO STANDING TO CHALLENGE THE STATE OF NEW YORK'S WITHHOLDING OF MONEY FROM ERICSSON

In order to invoke the jurisdiction of this Court, Sierra must demonstrate that it has 1) personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the State 2) that the injury can be fairly traced to the challenged action and that 3) the injury is likely to be redressed by a favorable decision. *ASRACO Inc. v. Kadish*, 490 U.S. 605, 619, (1989) *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, (1982). With regard to its procedural due process challenge to the State's withholding of money from Ericsson, Sierra can demonstrate none of these.

Sierra challenges the Department's action in withholding money from Ericsson as violating its right to procedural due process. The State never withheld any money from Sierra and Sierra acknowledges that in its petition (Petition p. 6-7). Sierra claims, however, that Ericsson in turn withheld money from

it.[13] The assertion is insufficient to confer standing upon Sierra because no such fact is contained in the record.[14] Second, even if this assertion were supported by the record, there are no facts from which this Court could conclude that Ericsson's withholding from Sierra depended on the State's withholding of money from Ericsson, or that the withholding of Sierra's money by Ericsson is likely to be redressed by an order of this Court.

The record does contain the subcontract entered into by Ericsson and Sierra. That contract provides that "Ericsson may withhold money due for claims which might be the subject of reimbursement to Ericsson by the subcontractor" (A 765). The Department, by virtue of its investigation and its estimation of wage underpayments, had a claim against Ericsson which would be subject to reimbursement by Sierra. Thus, even absent the Department's withholding of money from Ericsson, Ericsson was authorized by the subcontract to withhold money from Sierra. Moreover, even if this Court were to order the State to release Ericsson's money that would not necessarily redress Sierra's injury.[15] Under the terms of the subcontract,

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[13] Sierra correctly states, in its Statement of the Case, that the State withheld money from Ericsson (Petition p. 6). However, its argument is premised upon the admittedly incorrect fact that it was Sierra's property that was seized (Petition p. 19, 22). Sierra never attempts to explain or justify this factual misstatement.

[14] Sierra's assertion that Ericsson withheld money from it is without citation to the record, as well it must be. Counsel for respondents has searched the record and can find no evidence of this alleged withholding which Sierra raises for the first time in this Court.

[15] The only relief that might redress Sierra's injury is a reversal of the Commissioner's order on the merits of the underlying claims. Sierra has never demonstrated that it would be entitled to that relief if it were to succeed on its procedural due process challenge to the withholding of money with a prior hearing.

so long as the claims are outstanding Ericsson is entitled to withhold money from Sierra. That entitlement is not conditioned upon the State's withholding of money from Ericsson.

Even if Sierra had standing, its procedural due process claim would fail on the merits because Sierra does not have a property interest in Ericsson's money. Sierra claims that the State deprived it of property without providing constitutionally adequate procedures. In order to succeed on the merits of this claim, Sierra must demonstrate that it has a property interest in the money the State withheld from Ericsson. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Property interests are not created by the Constitution but by independent sources, such as state law. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Sierra bases its claim on the factually flawed premise that it was Sierra's property which the State seized. Sierra has shown no protected property interest in money due to Ericsson and, as such, cannot succeed on the merits of its claim.

Finally, the money which the State withheld from Ericsson has been released to the workers pursuant to the Commissioner's Order issued after a hearing. Thus, Sierra's claim that it was a violation of due process to withhold money without a prior hearing is moot.[16]

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[16] Sierra did not request damages; it sought only to review the Commissioner's Order and Determination pursuant to Labor Law § 220-b(2).

3. THERE WERE NO CONSTITUTIONAL INFIRMITIES IN THE CONDUCT OF THE HEARING

The only other issue properly preserved is whether it was unconstitutional for the hearing officer to admit into evidence written statements of three workers. Sierra has shown no special reason why this Court should grant a writ of certiorari to review the admission of three pieces of evidence for which the only purpose was to demonstrate that those three workers performed work on the project which entitled them to be paid a telephone wage rate other than the lowest one on the schedule.[17] Moreover, Sierra's claim that it was denied the right to cross examine these workers cannot succeed absent Sierra's attempt to call the workers, its own employees, itself. The issue is plainly not of general importance.

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[17] Sierra's claim that these statements were the only evidence of work performed on the project is untrue (Petition p. 28). The project specifications described all the work to be done on the project and that, along with Sierra's payroll records, described the work done by all the workers was technical work involving the installation of a telephone system. The evidence was introduced without objection.

CONCLUSION

FOR ALL THE FOREGOING REASONS, RESPONDENTS RESPECTFULLY REQUEST THAT THE PETITION FOR A WRIT OF CERTIORARI BE DENIED

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APPENDIX

§ 223. Enforcement of article

If the fiscal officer as defined herein finds that any person contracting with the state, a municipal corporation, or any commission appointed pursuant to law, for the performance of any public work fails to comply with or evades the provisions of this article, he shall present evidence of such noncompliance or evasion to the officer, department, board or commission having charge of such work for enforcement. Wherein such evidence indicates a noncompliance or evasion on the part of a subcontractor, the contractor shall be responsible for such noncompliance or evasion. It shall be the duty of any officer, department, board or commission in charge of the construction of such public work contracts to enforce the provisions of this article.

(L.1921, c. 50; amended L.1935, c. 929, § 1.)